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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 766

DUNCAN MILLER,

Petitioner,

v.

SHELL OIL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Your petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, for the Tenth Circuit.

OPINIONS BELOW

The Court of Appeals and District Court did not write an opinion.

JURISDICTION

A timely petition for rehearing en banc was denied on July 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner could have his property taken away from him, pursuant to a legal action in a State Court that was fraudulently withheld from him; and whether, pursuant to the 5th Amendment to the Constitution of the United States, various hamstringing evasions by the respondent in this case, which were permitted to remain in the record, unresolved, constitute a denial of petitioner's Constitutional rights.

STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Mineral Leasing Act of 1920, as amended, 30 U.S.C. Sec. 181 *et seq.* The Federal Rules of Civil Procedure pertaining to discovery, judgment on the pleadings, and summary judgment. The 14th and 5th Amendments to the Constitution of the United States.

STATEMENT

Petitioner-plaintiff filed the Complaint in the Federal District Court at Albuquerque, New Mexico in substance alleging conspiracy and fraud in taking petitioner's property (money), from his bank account, through the device of a State of New Mexico District Court, Chavez County, Action, which respondent-defendant fraudulently concealed from petitioner.

Under Count 2, plaintiff alleged monopolistic wrong-doing under the Federal Mineral Leasing Act, on the Public Domain.

The defendant moved for dismissal which was granted by the District Court. An amended supplemental complaint was filed after dismissal of the Complaint.

On appeal the Appellate Court reversed the decision.

After remand, defendant again moved for dismissal and summary judgment (R. 29), attaching various documents from the Chavez County Court action. Among these was an affidavit for publication (R. 40). Plaintiff moved for judgment on the pleadings. The District Court denied all motions.

The defendant purported to answer the Complaint (R. 87). At R. 89, paragraph 10, it said: "answering paragraphs, numbered 10, 11, 12 of the Supplemental Complaint." But this was decietful. See: R. 14, 15 (said paragraphs) and compare with answer.

Various interrogatories and requests for admission of facts were submitted to the defendant-respondent to most of which the response was evasive and unmitigated evasion.

The case went on despite defendant's derelictions to an ultimate decision dismissing the complaint; with the District Court ignoring the combined series of motions (R. 149), which delineated the apparent evasions *and*, most important, specifically, as to the allegations of the Complaint in said Paragraphs 10, 11, 12. Most of the motions involved were the kind ordinarily ruled on without oral argument, however, defendant did appear and made evasive, misleading and absurd arguments (R. 172-84), but the Court granted defendant's motion for a cost bond.

The defendant-respondent at its leisure was permitted to compose orders for the Court in the proceedings prior to the first appeal. Plaintiff pointed out that the defendant took advantage of this trust, by delaying and using the time element involved to jeopardize the timeliness of the Notice of Appeal, then moving to dismiss appeal (R. 77, line 10). Respondent has refused to make any definitive explanation of the above inferences from stated facts.

After notice of appeal was filed in the District Court (on the second appeal), orders were made extending the time to docket the record with the appellate court (R. 168-71). Meanwhile, the rules of the Court of Appeals were changed, and through various inadvertencies, the record on appeal was not delivered to petitioner-appellant until after the case was decided, hence he was unable to correlate his briefs on appeal with the record in and from the District Court, and the Appellate Court affirmed the District Court. A petition for rehearing en banc was denied July 27, 1967.

REASONS FOR GRANTING THE WRIT

The statement of the case is surely shocking as this Court must agree, but it is factual; it is an honest statement, and it shows fraud upon the part of the respondent. Petitioner could fill page after page with citations, condemning such practices. The following is one in point:

> "Fraud" includes anything *calculated to deceive*, whether it be a single act or combination of circumstances, whether suppression of truth or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth or by look or gesture. (Emphasis supplied.) *Gibbons v. Brandt*, 170 F.2d 385, C.C.A. Ill. (1948).

The affidavit to the State Court for publication of Summons (R. 40) was fraudulent, as shown by exhibits (R. 22-24), because these exhibits prove and proved that plaintiff was communicating with the defendant's officers, by telegram, telephone and letter; but at the very same time the fact that it had a legal action (lawsuit) pending in said Court against plaintiff was withheld from him, by *calculated deceit*, during said communications. This was about the precise time (within a few weeks) prior to said affidavit, which professed no knowledge of petitioner's "whereabouts".

Since it is under the above circumstances, that respondent got away with petitioner's money and since the Federal Con-

stitution guarantees against such depredeations, this then, is reason alone to grant the writ.

This Court has held in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314, 208 S. Ct. 410:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is Notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In the Federal District Court, after engaging in a fraud in the State Court, that resulted in a violation of the 14th Amendment to the Constitution of the United States, the respondent did the same thing with respect to the 5th Amendment, by its evasions.

Plaintiff's lawsuit never got off the ground, with respect to Count 2. Defendant evaded and then evaded its evasions with respect to the key allegations of the Complaint as documented, *supra*. If respondent can show that the foregoing statement is not true plaintiff will gladly withdraw his petition.

CONCLUSION

On Count 1 in the District Court, petitioner had all the elements necessary for Summary Judgment proven; said Exhibits proved the allegations of the Complaint.

On Count 2, because of the evasions, the case should be remanded to the District Court for further proceedings, and for Count 1, reversed and remanded with instructions to grant Summary Judgment for petitioner.

Respectfully submitted,

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